

# SUPREME COURT OF QUEENSLAND

CITATION: *Leadpoint Pty Ltd v Legal Services Commissioner* [2015] QSC 254

PARTIES: **LEADPOINT PTY LTD ACN 124 578 892**  
(applicant)

v

**LEGAL SERVICES COMMISSIONER**  
(respondent)

FILE NO/S: BS6635/15

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 1 September 2015

DELIVERED AT: Brisbane

HEARING DATE: 24 August 2015

JUDGE: Jackson J

ORDER: **The order of the court is that:**

- 1. The application for a statutory order of review is dismissed.**
- 2. The applicant pay the respondent's costs of the proceeding.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – DECISIONS UNDER AN ENACTMENT – GENERALLY – where the applicant made a complaint that a company was engaging in legal practice in contravention of section 24 of the *Legal Profession Act 2007* (Qld) – where the respondent referred the complaint for investigation by the Queensland Law Society – where the Queensland Law Society made an investigation report and recommendation – where the respondent decided not to take any further action – where the applicant applied for a statutory order of review of the respondent's decision to not take further action – where the respondent applied to dismiss the application for the statutory order of review – whether the respondent's decision not to take any further action was a decision “made under an enactment”

*Acts Interpretation Act 1954* (Qld), s 42  
*Judicial Review Act 1991* (Qld), ss 4, 20, 48

*Legal Profession Act 2007 (Qld)*, sch 2, ss 24, 416, 426, 428, 429, 435, 436, 439, 446, 448, 590, 703, 708, 709

*Eastman v Australian Capital Territory* (2008) 163 ACTR 29; [2008] ACTCA 7, referred to  
*Griffith University v Tang* (2005) 221 CLR 99; [2005] HCA 7, followed

*Mid Brisbane River Irrigators Inc v The Treasurer and Minister for Trade of the State of Queensland* [2014] 2 Qd R 592; [2014] QSC 196, referred to

*Murphy v Legal Services Commissioner* [2013] QSC 70, considered

*Nona v Barnes* [2013] 2 Qd R 528; [2012] QCA 346, referred to

COUNSEL: A Morris QC for the applicant  
J Bell QC and A Scott for the respondent

SOLICITORS: Leadpoint Mortgage Services for the applicant  
Legal Services Commission for the respondent

- [1] **Jackson J:** The respondent applies under s 48 of the *Judicial Review Act 1991 (Qld)* (“JRA”) to dismiss an application for a statutory order of review made under s 20 of the JRA (“the originating application”).
- [2] The originating application is for review of the respondent’s decision not to take any further action upon a complaint made by the applicant to the respondent.
- [3] The complaint was that First Mortgage Services Australia Pty Ltd (“FMS”) engages or has engaged in legal practice in Queensland. FMS is not an Australian legal practitioner or an incorporated legal practice. The applicant’s complaint is, therefore, that FMS contravenes or has contravened s 24 of the *Legal Profession Act 2007 (Qld)* (“LPA”).

### **Grounds of the application to dismiss**

- [4] The respondent’s application to dismiss the originating application is based on two grounds. First, the respondent submits that the decision was made in the exercise of a discretionary power whether or not to prosecute for an offence. Second, the respondent submits that the decision was not a decision made under an enactment within the meaning of s 4 of the JRA.

### **Provisions of the LPA**

- [5] Section 24(1) of the LPA provides that a person must not engage in legal practice in this jurisdiction unless the person is an Australian legal practitioner. It does not apply to a legal practice engaged in by an incorporated legal practice under pt 2.7.<sup>1</sup> Contravention of the subsection is an offence. The maximum penalty is 300 penalty units or two years imprisonment. The expression “engage in legal practice” is defined in sch 2 of the LPA so that it includes “practise law”.

<sup>1</sup> *Legal Profession Act 2007 (Qld)*, s 24(2)(b).

- [6] A related expression deployed in the LPA is “unlawful operator”. It is defined in sch 2 to mean two classes of person. The relevant class is “a person who engages in legal practice in this jurisdiction even though the person must not do so under section 24”.
- [7] Chapter 4 of the LPA deals with complaints and discipline. By s 416(d), one of the purposes of that chapter is to protect members of the public from unlawful operators. However, ch 4 is also structured to apply to Australian lawyers and former Australian lawyers and Australian legal practitioners. It deals with questions of unsatisfactory unprofessional conduct and professional misconduct of all or some of those lawyers, quite apart from the subject of unlawful operators.
- [8] Part 4.4 is headed “Complaints about Australian Legal Practitioners”, but it is clear from s 428 that a complaint may be made under that part about the conduct of an unlawful operator in relation to conduct that constitutes a contravention of s 24. Section 429 provides that an entity may make a complaint about, inter alia, the conduct of an unlawful operator. The applicant made its complaint about FMS to the respondent in accordance with that section.
- [9] When a complaint is received by the Commissioner, the Commissioner may refer the complaint to a relevant regulatory authority under s 435 of the LPA. The Queensland Law Society Incorporated (“QLS”) is a relevant regulatory authority. The respondent referred the applicant’s complaint to the QLS.
- [10] Had the respondent not referred the applicant’s complaint to the QLS, he would have been obliged to investigate the complaint under s 436(1) or s 436(2) of the LPA.
- [11] Under s 439(1) of the LPA, a regulatory authority to whom a complaint is referred must investigate the complaint and report to the Commissioner. The report must include a recommendation about whether a proceeding before a disciplinary body in relation to the complaint should be started.<sup>2</sup> The QLS reported to the respondent and made a recommendation not to start a proceeding.
- [12] Section 446 of the LPA applies after a complaint about an unlawful operator has been investigated. The section provides:

**“446 Powers of commissioner relating to complaint or investigation matter relating to unlawful operator**

- (1) This section applies after a complaint or investigation matter about an unlawful operator has been investigated.
- (2) As the commissioner considers it appropriate, the commissioner may—
  - (a) start proceedings to prosecute the unlawful operator under this Act; or
  - (b) give to the commissioner of police the results of the investigation; or
  - (c) refer the complaint or investigation matter to the law society for further investigation; or

---

<sup>2</sup> *Legal Profession Act 2007 (Qld)*, s 439(3).

- (d) decide to no longer deal with the matter the subject of the complaint or investigation matter.
- (3) Subsection (2)(a) does not limit the *Acts Interpretation Act 1954*, section 42.
- (4) For subsection (2)(b), the commissioner may enter into arrangements with the commissioner of police.”
- [13] Part 4.7 of the LPA is headed “Decision of commissioner”. Section 448 provides that in some circumstances the Commissioner may dismiss a complaint. However, those circumstances are such that they do not deal with a complaint about an unlawful operator. That is to say, s 448 does not empower the Commissioner to dismiss a complaint about an unlawful operator. That is the territory of s 446. See *Murphy v Legal Services Commissioner*.<sup>3</sup>
- [14] Under s 446(2) of the LPA, the Commissioner may deal with a complaint about an unlawful operator that has been investigated in four ways. First, he may start proceedings to prosecute the unlawful operator under the LPA. A proceeding to “prosecute” is a proceeding for an offence. Under s 708 of the LPA, an offence against the Act, including an offence against s 24, is a summary offence. Under s 709, a proceeding for a summary offence against the Act may be made by way of summary proceeding under the *Justices Act 1886* (Qld) within certain time limits.
- [15] Alternatively, under s 703 of the LPA, the Commissioner may apply to the Supreme Court for an injunction restraining a person from engaging in conduct that constituted, constitutes or would constitute an offence, including s 24.
- [16] In any such case, under s 590(3) of the LPA, the Commissioner may appear for the purpose of prosecuting a person as an unlawful operator.
- [17] The second alternative open to the Commissioner under s 446(2) of the LPA, after a complaint about an unlawful operator has been investigated, is to give the results of the investigation to the Commissioner of Police. The Commissioner of Police can cause a proceeding to be started under the *Justices Act 1886* (Qld) by an appropriate officer.
- [18] The third alternative open to the Commissioner under s 446(2) of the LPA, after a complaint about an unlawful operator has been investigated, is to refer the complaint to the QLS for further investigation. It is unnecessary to discuss that alternative further in this case.
- [19] The last alternative open to the Commissioner under s 446(2) of the LPA, after a complaint about an unlawful operator has been investigated, is to decide no longer to deal with the matter the subject of the complaint.
- [20] The decision in the present case by the respondent was made under that alternative. It does not matter that the respondent stated to the applicant that he was dismissing the complaint in saying that he would take no further action on it.

---

<sup>3</sup> [2013] QSC 70, [95]-[97].

### Decision made under an enactment

[21] It is convenient to deal with the respondent's second ground first. Section 20 of the JRA applies to a decision to which that Act applies. Section 4 defines a decision to which that Act applies to mean, relevantly, a "decision of an administrative character made ... under an enactment (whether or not in the exercise of discretion)".

[22] In *Griffith University v Tang*<sup>4</sup> the plurality considered the requirements of that part of the definition as follows:

"What is it, in the course of administration that follows from or arises out of the decision taken so as to give that significance which has merited the legislative conferral of a right of judicial upon those aggrieved?

The answer in general terms is the affecting of legal rights and obligations. Do legal rights or duties owe in an immediate sense their existence to the decision, or depend upon the presence of the decision for their enforcement?

To adapt what was Lehane J in *Lewins*, does the decision in question derive from the enactment the capacity to affect legal rights and obligations? Are legal rights and obligations affected not under the general law but by virtue of the statute?"<sup>5</sup> (footnotes omitted)

[23] The respondent submits that the decision no longer to deal with the matter, (and, therefore, not to start proceedings to prosecute, not to give to the Commissioner of Police the results of the investigation of the applicant's complaint and not to refer the complaint to the QLS for further investigation) is one that does not "itself" affect any rights or obligations.

[24] In support of that submission the respondent relies on *Nona v Barnes*<sup>6</sup>. In that case, Fraser JA said:

"The primary judge was correct in holding that the only relevant 'decision' was the decision to not send information to the Director of Public Prosecutions which was made only when the omission to send the information was manifested as a decision in correspondence from the Coroner to the appellants' solicitor. That decision did not satisfy the second criterion in *Tang* that it 'confer, alter or otherwise affect legal rights or obligations, and in that sense ... derive from the enactment' because, as the primary judge held, the mere receipt or non-receipt by the Director of Public Prosecutions of the information would not have any effect upon any legal rights or obligations."<sup>7</sup>

---

<sup>4</sup> (2005) 221 CLR 99.

<sup>5</sup> (2005) 221 CLR 99, 128 [79]-[80].

<sup>6</sup> [2013] 2 Qd R 528.

<sup>7</sup> [2013] 2 Qd R 528, [20].

- [25] The applicant submits that in *Murphy v Legal Services Commissioner*,<sup>8</sup> Daubney J set aside a decision purportedly made under s 448 of the LPA but which in part could only be made under s 446 of the LPA as the provision governing the prosecutorial discretion in respect of an unlawful operator. The respondent submits that Daubney J's order was made necessarily on the footing that the decision was one of an administrative character made under an enactment within the meaning of s 4 of the JRA. I agree. However, his Honour expressly noted that it was not suggested in that matter that the decision was not a decision of an administrative character made under an enactment or that it was not a decision to which the JRA applied.<sup>9</sup>
- [26] There are not many cases of assistance in considering the question whether there is any effect on a legal right or obligation in this case. I considered the operation of the relevant principles in *Mid Brisbane River Irrigators Inc v The Treasurer and Minister for Trade of the State of Queensland*,<sup>10</sup> but the point raised there is not truly comparable to this case. The decision of the Court of Appeal of the Supreme Court of the Australian Capital Territory in *Eastman v Australian Capital Territory*<sup>11</sup> is of more assistance. But the question must ultimately be answered by a close consideration of the particular statutory context and the rights and obligations on which the decision might have any effect.
- [27] In my view, the precise question in the present case should not be approached initially as though the Commissioner's powers under s 446 are binary. A prosecutor's decision to start a criminal proceeding is usually binary. Either the proceeding is started or it is not. The analogy between that form of decision and the alternative powers under ss 446(2)(a) and (d) is clear enough.
- [28] But to treat s 446(2) of the LPA in that way generally, would be to fail to recognise the other alternatives provided for under ss 446(2)(b) and (c). If the results of an investigation are given to the Commissioner of Police, the Commissioner of Police may become obliged to deal with them. The parties made no submission on this point.
- [29] Similarly, if a complaint is referred to the QLS for further investigation, the QLS would prima facie be subject to the obligation under s 439(1) of the LPA to investigate the complaint and report to the Commissioner about it. The decision would create an obligation for the QLS. I also observe that if the Commissioner decides to start a proceeding to prosecute, and starts the proceeding, in the course of the proceeding the parties will have rights and will be subjected to obligations.
- [30] In those circumstances, it may be said that to conclude that the decision no longer to deal with the subject matter does not satisfy the criterion that it confer, alter or otherwise affect legal rights or obligations depends on the particular character of a decision "to no longer deal with the matter".
- [31] So viewed, in my view, no relevant legal rights or obligations are conferred, altered or otherwise affected by the decision. It is not suggested that the Commissioner's power under s 446(2)(d) of the LPA to decide to no longer deal with the matter is a

---

<sup>8</sup> [2013] QSC 70.

<sup>9</sup> [2013] QSC 70, [57].

<sup>10</sup> [2014] 2 Qd R 592, 597-598 [20]-[24].

<sup>11</sup> (2008) 163 ACTR 29, 37-38 [24]-[29].

“once only” decision. If circumstances were to change, for example, if better evidence became available, nothing would stop the respondent from revisiting the decision to no longer to deal with the matter, except for the passing of any relevant limitation period to start a prosecution.

- [32] The applicant particularly relies upon the proposition that the Commissioner has significant investigative powers. The point made is that although the applicant itself might start a proceeding to prosecute an unlawful operator relying on s 42 of the *Acts Interpretation Act 1954* (Qld) or possibly by bringing proceedings in this Court under the jurisdiction of this Court that is preserved, the investigative powers of the respondent are significant and are not available to the applicant as a private prosecutor or person who might start a proceeding.
- [33] All that is true enough. However, once it is accepted that the decision in the present case was one made under s 446(2)(d) of the LPA, it must also be accepted that it was a decision made after the complaint had been investigated, within the meaning of s 446 of the LPA. The applicant does not challenge the decision on the ground that the complaint was not investigated.
- [34] The applicant might be dissatisfied with the quality or the results of the respondent’s or the QLS’s investigation (under s 439 of the LPA) or the decision of the respondent to refer the complaint to the QLS as the relevant regulatory authority (under s 435 of the LPA). But those matters are not conduct or decisions of the respondent which are challenged as being invalid by the originating application. The originating application relates to the decision under s 446(2)(d) of the LPA to no longer deal with the matter.
- [35] In my view, that decision is not one to which the JRA applies because it does not have an effect upon legal rights or obligations in the relevant way.
- [36] For those reasons, in my view, the originating application must be dismissed.